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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-700

BERT L. PAIEWONSKY,

Petitioner,

against

RALPH M. PAIEWONSKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

References to the opinions below are adequately set forth in the petition. Respondent does not concur in their explication set forth in summary fashion at p. 5 of the petition and elsewhere therein at greater length.

Question Presented

Whether a state, in conformity with its policy of promoting the marital relationship, may properly employ the common-law doctrine of interspousal immunity so as to bar its courts from hearing certain kinds of claims which either strike at the heart of the marital relationship or invite the collusion of both spouses in a quest for imposing liability on a third party.

Constitutional and Statutory Provisions Involved

The provisions of the United States Constitution, of 42 U.S.C. § 1981 and of the Virgin Islands Code relied upon by petitioner are set forth in the petition at pp. 2-3.

Also pertinent is 16 Virgin Islands Code § 673, which reads as follows:

> "Should either the husband or the wife obtain possession or control of property belonging to the other, either before or after marriage, the owner of the property may maintain an action therefor or any right growing out of the same, in the same manner and to the same extent as if they were unmarried."

Facts

The "factual" recitation given in the petition (pp. 4-5) differs in a variety of ways from the allegations set forth in the complaint. Additionally, that recitation suffers from an inaccuracy of historical detail which is manifest upon its face. The absurdity of the claim that respondent, in January of 1960, when the parties contemplated marriage could have known that Senator John F. Kennedy would receive the Democratic nomination for the Presidency in the summer of that year, be elected to that position in November of that year, and upon that basis conclude that he was likely to be appointed Governor of the Territory is charming indeed.

For the purposes of this litigation in its present posture, however, the allegations of the complaint are of course deemed to be true. We have thus annexed to this brief a copy of the complaint (Appendix A), which we respectfully suggest is the sole presentation of those "facts" which are properly before the Court.

ARGUMENT

Eternity is passion; girl or boy
Cry at the onset of their sexual joy
'Forever and forever,' then awake
Ignorant what Dramatis Personae spake.

—W. B. Yeats

What's sauce for the goose is sauce
for the gander.

—an old recipe

For better or for worse, the marital relationship has from time immemorial been the beneficiary of religious and secular promulgations designed to foster its tranquility. Some of these, experience proved, worked injustice, and came to be abrogated or modified. Others continue pretty much in force today.

Whatever one may think about the legal fiction that forms the theoretical substrate of the doctrine of intersponsal immunity, one thing is readily apparent: that doctrine effectively barred all judicial interference with the assumed tranquility of the matrimonial relationship. One might, where proper statutory foundation existed, have sued for divorce or some other remedy terminating the marital relationship; but so long as that relationship remained viable, the doctrine of interspousal immunity effectively barred the courts from intruding upon the affairs of husband and wife.

Experience, as we have observed, has led the competent legislative bodies of a variety of jurisdictions—among them, the Virgin Islands—to conclude that the absolute doctrine of interspousal immunity should be modified to accord some limited access to the courts in litigation—other than classic matrimonial litigation—between husbands and wives. Such enactments sometimes confer the right to sue *ex contractu,* and sometimes *ex delictu.*

Whether the statutes speak of contract or tort, of property or personal rights, they have this much in common: as a rule, they continue the unavailability of judicial redress where the remedy sought is money damages and the gravamen of the action is alleged tortious conduct which involves, as does the alleged tortious conduct set forth in the complaint herein, the very essense of the marital relationship. See, e.g., *Weicker* v. *Weicker*, 28 App. Div. 2d 138, 283 N.Y.S. 2d 385 (1st Dep't, 1967), *aff'd*, 22 N.Y. 2d 8, 290 N.Y.S. 2d 732 (1968).

In the present case, petitioner alleges in substance that respondent fraudulently cried "forever and forever" and then, for a finite period of time, persisted in those fraudulent avowals, thereby entitling her to recover money damages. The District Court held that Virgin Islands law precluded the maintenance of such a suit, and dismissed the complaint. In so doing, the District Court declared the law of the Territory with the same force and authority as if it were the highest court of a state declaring the law of its jurisdiction, *Stainback* v. *Mo Hock Ke Lok Po*, 366 U.S. 368, 383 (1949). The Court of Appeals, in affirming, held that the construction of Virgin Islands statutes and common law by the District Court was in no manner incompatible with paramount federal law. Both courts correctly noted that only the legislature could properly authorize the maintenance of a suit such as the one presently at bar. See *Thompson* v. *Thompson*, 218 U.S. 611 (1910).

We submit that this Court is bound by the District Court's construction of Virgin Islands law, and that any question about the social utility of the territorial statutes involved in this litigation may only be determined by the appropriate legislative body, unless it can be affirmatively demonstrated that the statutes, or the underlying common law, are repugnant to the United States Constitution.

Petitioner, by harping upon the proposition that this litigation involves a suit by a woman against a man, seeks to invoke the "equal protection" clause of the Fourteenth Amendment to the United States Constitution in her efforts to set aside the judgments of the courts below. In doing so, petitioner ignores the fact that the underlying doctrine of interspousal immunity cuts both ways, and that at common law, a husband could not maintain against a wife the kind of suit with which petitioner presently seeks to burden this Court.

I.

The decision below is clearly correct.

The Court of Appeals, in a meticulous analysis of the problem before it, noted that 1 Virgin Islands Code § 4 provides:

> "The rules of the common law, as expressed in the restatement of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands . . ." (Petition, pp. 18a-19a).

It cannot be disputed that the doctrine of interspousal immunity is part of the common-law tradition and that in the majority of American jurisdictions it retains its full vitality (43 A.L.R. 2d 632); and therefore the function of the courts below was to determine whether other provisions of the Virgin Islands Code so altered that doctrine as to authorize the maintenance of the present action. In light of the familiar proposition that statutes in derogation of the common law are to be strictly construed, it is manifest, we respectfully submit, that the court below correctly parsed the language before it in reaching the conclusion that the present action, which would have been

barred at common law by the doctrine of interspousal immunity, is not exempted from that bar by any provision of the Virgin Islands Code.

II.

This Court should not review the decision below upon the ground, asserted by petitioner, that it is "based upon an archaic common law principle that is ripe for re-examination".

Petitioner, in her Point 1, in effect argues that the Court should substitute its judgment for that of the highest court of a state or territory irrespective of any conflict between the judgment of the state or territorial court and principles of the federal Constitution or statutes. This is to ask that the Supreme Court impose upon the states and territories its own, soon-to-be fashioned common law for no better reason than the possibility that "a uniform rule" (Petition, p. 14) might perhaps be socially desirable.

As every American lawyer knows or should know, both common law and statutory principles vary widely among the states: as an academic discipline, the subject of conflict of laws is uniquely American. Things would doubtless be much easier for the harried practitioner if one body of decisional authority obtained throughout the nation, but to achieve that end, a major redrafting of the Constitution would be required.

At any rate, there would seem to be no reason presented in the present litigation for the disavowal of the long-standing tradition that review by this Court is limited to federal issues, and may not properly encompass the reconsideration of a state or territorial common-law principle upon the mere assertion by a party that it is "archaic"

or contrary to the present minority view.* See *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); 7B Moore's Federal Practice (1971) § 1257.

III.

This Court should not review the decision below upon the ground, asserted by petitioner, that it is "in conflict with decisions throughout the United States whose judgment is final in the absence of Supreme Court review".

Petitioner, in her Point 3, patently misconceives the nature of our federal system when she asserts that there is some "conflict" of decisional authority between the holdings of the courts below and the rulings of an Alaska court, for it is manifest, at the very least, that each court merely interpreted a specific legislative enactment. To say, as petitioner does (p. 15), that the holdings of the courts below "would require the courts of the remaining states which have not dealt with the question, to look to the legislatures of their own states for enactment of new statutes which would 'express in terms of irresistible clearness' (*Thompson, supra*) an intent to abrogate the common law doctrine of interspousal immunity," is an exercise in absurdity, for it is a hornbook proposition that the decision of the highest court of one jurisdiction construing a statute enacted by the legislature of that jurisdiction has no binding precedential effect upon the courts of a second jurisdiction when construing a statute enacted by their legislature even though the two statutes are identical in text.

Petitioner's reference to *Funk* v. *United States*, 290 U.S. 371 (1933) is inapposite, for in that case, all the Court

* The authorities comprising the minority view claimed by the Petitioner to be the correct one are discussed in Appendix B.

did was to declare, in the absence of congressional treatment of the subject, a rule of evidence to be applied solely in lower federal courts. In later cases, the Court took pains to observe that its power to reshape common-law doctrine rested on its situation at the apex of the structure of the federal judicial system, and might properly be employed only in the declaration of federal law in the absence of congressional mandate. Not only did this Court declare itself impotent to refashion state common law, but it also held that it lacks the power to refashion the common law of a jurisdiction other than a state—like the Virgin Islands—even though its courts are federal, rather than state, courts, See *Fisher* v. *United States*, 328 U.S. 463 (1946); *Griffin* v. *United States*, 336 U.S. 704 (1949).

IV.

There is no conflict of decision.

In Point 4 of the petition, the novel argument is advanced that this Court should review the substance of the present litigation because of an asserted conflict of decision between the holdings of the courts below and a declaration of the Supreme Court of New Jersey construing the law of that state. Apart from the proposition, adverted to above, that there can really be no conflict when the courts of two jurisdictions construe their own laws in ways that differ as dramatically as opposite constructions of statutes identical in text, it is plain, as pointed out by the Court of Appeals (petition, p. 18a), that *Immer* v. *Risko*, 56 N.J. 482, 267 A.2d 481 (1970) concerned so vastly different a nexus of events from what is herein presented that the strict holdings of both courts—shorn of various kinds of dicta—could have emanated the same day from the same

forum.* All that apples and oranges have in common, after all, is that they are both species of fruit.

In Point 5 of the petition, it is claimed that the decision of the court below is in conflict with that of the Fifth Circuit in *Gaston* v. *Pitman*, 413 F.2d 1031 (5th Cir. 1969). However, once again, no conflict is presented, because in that case, the sole question presented was whether Florida law permitted a divorced woman to sue her former husband to recover damages for the wrongful death of her minor child which occurred prior to the parties' marriage; and that question was answered in the affirmative by the Supreme Court of Florida, upon the question's having been certified to it by the Court of Appeals. Since the nearest thing to a "conflict" between the *Gaston* case and the present litigation is between the highest court of a state and a United States court of appeals, it is plain that there is no true conflict among the circuits; moreover, what we have said about the asserted "conflict" between *Immer* v. *Risko* and the decision of the court below is equally applicable in this context.

V.

There is no conflict between the decisions below and principles of the federal constitution or statutes.

In her Point 2, petitioner asserts that the decisions below are in violation of the provisions of 42 U.S.C. § 1981,

* In the penultimate paragraph of its opinion, the New Jersey court in *Immer* v. *Risko* observed:

> *"In departing from the old rule, we explicitly limit our decision to claims arising out of motor vehicle accidents*: There are obviously some areas in the relationship between husband and wife that courts should not become involved in. We cannot decide today any more than what is before us, and the question of what other claims should be entertained by our courts must be left to future decisions" (emphasis supplied).

and then quotes from that statute snippets which might make it appear that it is illegal for a court to dismiss a complaint for failure to state a cause of action. The trouble with this argument—apart from the proposition that the right to sue is no guarantee that the plaintiff will invariably succeed—is that it ignores the history of the statute, as well as its complete text. Originally enacted (Act of May 31, 1870, 16 Stat. 144) in the period of Reconstruction following the Civil War, the statute's purpose was to emphasize the proposition that diverse treatment of individuals because of their color was no longer to be tolerated. Thus:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other."

Nowhere in the record does there appear any intimation that petitioner is not a "white citizen" as that term is used in the statute; therefore, *a fortiori*, she cannot claim that she was treated differently from a white citizen, and cannot properly invoke the sway of 42 U.S.C. § 1981. Moreover, even if that statute might properly be construed to render unlawful disparate treatment of men and women, it is plain that nothing of the sort exists in the present case, for the complaint was dismissed upon the doctrine of interspousal immunity, and that doctrine is equally applicable to husbands and wives.

In her Point 6, petitioner mischaracterizes the reasoning of the court below to make it seem that it declared that "the legislative interest in promoting domestic tranquility is sufficiently compelling" to warrant discrimination

against women *as such*. Actually, what the court did was to dispose of petitioner's argument that the doctrine of interspousal immunity is unfair because thereunder a married woman is precluded from suing her husband for damages in a situation where a mistress might properly maintain an action against her paramour. Certainly the court below did not in any way suggest that the doctrine of interspousal immunity might be applied one way to wives and another way to husbands.

The only question of "classification," therefore, is between married people and unmarried people. A holding by this Court that such a classification is improper under the Equal Protection Clause of the Fourteenth Amendment would be the erasure not only of centuries of common-law wisdom, but of much of federal and state statutory law as well. Clearly, the petition sets forth no compelling reason why this Court should be called upon to engage, by way of judicial legislation, in so vast a program of social experiment.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the present petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

(Complaint)

(DOCUMENT No. 1)

IN THE

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

[SAME TITLE]

Plaintiff, by her attorneys, complaining of the defendant, respectfully alleges:

AS AND FOR A FIRST CAUSE OF ACTION

1. Plaintiff is a resident of and domiciled in the Virgin Islands of the United States, residing at Botezburg, St. Croix, Virgin Islands.

2. Defendant is a resident of and domiciled in the Virgin Islands of the United States, residing in St. Thomas, U.S. Virgin Islands.

3. Upon information and belief, prior to March 1960, a decree of divorce was entered severing the bonds of matrimony then existing between defendant and his then wife.

4. At the time of the entry of said decree of divorce and prior to March 12, 1960, defendant was, upon information and belief, prominently identified with and active in business, politics and a wide spectrum of community and civic affairs and aspired to high political office.

5. Upon information and belief defendant undertook to and did expend considerable efforts and monies in connection with and in furtherance of his ambition and aspirations, as aforesaid.

6. Upon information and belief prior to March 12, 1960, defendant believed and knew or had reason to believe and

know that there was an opportunity for him to gain appointment as Governor of the U.S. Virgin Islands.

7. Upon information and belief defendant learned, believed and knew or had reason to believe and know that the opportunity to gain such appointment as Governor of the U.S. Virgin Islands and to thereafter retain such position would be thwarted or diminished if he did not off-set the implications of his prior divorce and change his status from that of a divorced man.

8. Upon information and belief, defendant learned, believed and knew or had reason to believe and know that the opportunity to gain appointment as Governor of the U.S. Virgin Islands and to retain such position would be enhanced if he were married and to a woman who would contribute to his stature as a person of stability and maturity and who would aid in establishing for him the image and reputation of solidity and graciousness.

9. Prior to March 12, 1960 defendant stated and represented to plaintiff that he was in love with her, that his happiness depended upon having her love and companionship and that he wished to marry her so that he could spend his life with her.

10. Upon information and belief the statements and representations made by the defendant, as aforesaid, were false and were made with the intent that the plaintiff should rely and act thereon.

11. Plaintiff did believe and did rely and act up on the statements and representations so made by the defendant and was induced thereby to and did marry the defendant on March 12, 1960.

12. Upon information and belief, at the time that the defendant made the statements and representations as aforesaid, they were false and in truth and fact defendant

merely wished to present himself as a person possessed of the attributes of stability and morality generally associated with the married status so as to enhance the possibility of his appointment to the Governorship of the U.S. Virgin Islands and to gain and assure for himself, the continued presence and services of the plaintiff.

13. Upon information and belief at the time the defendant made the statements and representations as aforesaid, defendant wished merely to attain for and endow himself with the benefits which would accrue from his marriage to the defendant whose abilities and reputation were known to the defendant to be held in high regard and to obtain from the plaintiff, through his marriage to her, the services and functions which she, as first lady of the U.S. Virgin Islands, would be called upon to render and exercise and which, defendant knew or had reason to believe, would be of invaluable aid and assistance in establishing and maintaining for himself the public image of solidity and graciousness.

14. Following the plaintiff's marriage to the defendant on March 12, 1960 John F. Kennedy, the then President of the United States did appoint defendant to be Governor of the U.S. Virgin Islands.

15. Following defendant's marriage to plaintiff, plaintiff did act as official hostess as first lady of the U.S. Virgin Islands and in the ensuing nine years did render services and exercise functions which aided the defendant in establishing and maintaining the public image which he desired to generate and maintain and which operated to keep him in public office until March 1969.

16. Following the completion of the defendant's term as Governor of the U.S. Virgin Islands defendant, without reason or justification, abandoned plaintiff and initiated an action for divorce against her.

17. The defendant's abandonment of the plaintiff and initiation of a divorce action, as aforesaid, was due and occasioned, upon information and belief, by defendant's determination that he would no longer hold public office and that he therefore did not require the continued presence, services and functions of the plaintiff and maintenance of the public image which he had gained through marriage to the plaintiff.

18. By reason of the facts aforesaid plaintiff has suffered great humiliation and damage and for which plaintiff seeks recovery in the sum of Ten Million ($10,000,000.00) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs marked and number "1" and "2" with the same force and effect as if fully set forth at length herein.

20. Prior to March 1960, defendant's then wife instituted an action for divorce against him.

21. Following the entry of the decree of divorce severing the bonds of matrimony between defendant and his then wife, defendant married the plaintiff.

22. Upon information and belief, following such marriage, defendant and his former wife expressed their mutual regret that their marriage had terminated in divorce and discussed the eventuality of their remarrying each other.

23. Upon information and belief defendant knew or had reason to believe that a termination of his marriage to plaintiff while he held the office of Governor of the U.S. Virgin Islands would injure and damage his image and

reputation and adversely affect his tenure as Governor of the U.S. Virgin Islands.

24. Upon information and belief, defendant schemed and planned to continue his marriage to plaintiff only for so long as he was concerned with and desired to maintain his image and reputation for stability and maturity and hold the office of Governor of the U.S. Virgin Islands and to then terminate his marriage to plaintiff and remarry his former wife.

25. Defendant did not disclose or otherwise make known to plaintiff his design, scheme and plan, as aforesaid who relied upon the defendant's continued expressions of love for her and his admiration, appreciation and need for her presence.

26. Because of the defendant's failure to disclose or otherwise make known to plaintiff his design, plan and scheme, as aforesaid, plaintiff was prevented from knowing thereof and continued to reside with defendant in the marriage relationship and to perform and render all services as a wife and to perform, render and exercise the services and functions required or expected of her as the official first lady of the U.S. Virgin Islands.

27. Defendant's failure to disclose to plaintiff or otherwise make known to her his design and plan to terminate his marriage to her at such time as he would no longer wish to hold high political office was intentional, wilfull, wrongful and in total disregard of plaintiff's interests, health, sensibilities and dignity as a human being.

28. Defendant's acts and conduct as aforesaid were without regard to the rights and entitlements of the plaintiff and were occasioned solely out of a selfish interest for and concern with his own political and social aspirations and experiences.

29. Following completion of his term as Governor of the U.S. Virgin Islands defendant, without reason or justification, abandoned plaintiff and initiated an action for divorce against her with the purpose and intent of being free to re-marry his former wife.

30. By reason of the facts aforesaid plaintiff has suffered great damage, prejudice and hurt for which she seeks recovery and for which she claims, in addition, punitive damages, for a total of Twenty Million ($20,000,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Ten Million ($10,000,000.00) Dollars on the first cause of action and in the sum of Twenty Million ($20,000,000.00) Dollars on the second cause of action, together with the costs of this action.

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APPENDIX B

(Authorities of Minority View Claimed to be Correct by Petitioner)

In Point 1 of the petition, it is claimed that the views of nineteen American jurisdictions from which cases are cited at pp. 8 and 9 constitute the "prevailing judicial opinion by the courts throughout the United States" (petition, p. 8), contrary to the decision of the court below. Apart from the difficulties with petitioner's arithmetic, the cases cited do not, as we shall demonstrate, support her thesis. Similarly, petitioner mischaracterizes scholary authority with charming abandon. At pp. 12 and 13 of the petition appears a quotation from 1 HARPER & JAMES ON TORTS which is offered as authority for the proposition that the leading contemporary scholars subscribe to the theory that a suit such as the present one may properly be maintained. The quoted material speaks of "such harms," but does not indicate the antecedent. The immediately preceding paragraph of HARPER & JAMES makes it clear that "such harms" are violent physical injuries, primarily wrongful death, whether deliberately or negligently caused.

We shall now consider, in order, the cases cited at pp. 8 and 9 of the petition. Those cases, the careful reader will have observed, are collected as the "minority view" at 43 A.L.R. 647.

Brown v. *Brown*, 89 Atl. 889 (Conn. 1914) was an action in contract.

In *Fiedler* v. *Fiedler*, 140 Pac. 1022 (Okla. 1914), the statutes involved went far beyond those presently at bar in abrogating the doctrine of interspousal immunity, and were construed in the light of a tradition in that jurisdiction, mandated by its legislature, abolishing the common-law rule that statutes in derogation thereof are to be strictly construed. Thus, as the court observed at p. 1024:

> "But aside from the philosophy on the one side or the other, it appears to us that the plain English

language of our Constitution and statutes should enable us to determine what the rights of a married woman are intended to be in such cases. Section 6, act 2, of the Constitution of Oklahoma, provides: 'The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.' From the language of this section of the Bill of Rights, it appears to us that the framers of our Constitution clearly intended to open the courts of justice to every person, no matter whom, for redress of wrongs and for reparation for injuries.

In furtherance of such intention, our Legislature, realizing the harsh rules of the common law in such matters, has provided section 3353. Rev. Laws 1910: '*Woman shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man*; and for any injuries sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. * * *' (Emphasis supplied.)

Section 2845, Rev. Laws 1910, provides: 'Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damage.'

Section 2846, Id., defines what is meant by a detriment as follows: 'Detriment is a loss or harm suffered in person or property.'

Appendix B

> The foregoing statutes, it seems to us, are sufficiently clear to define the rights of persons, without discrimination or distinction, and to enable all persons to know just what their rights are and the courts to know just how to adjudicate them. But our Legislature, possibly in contemplation of such contingencies, and in order to avoid the reading into the statutes a meaning not intended, or at least in further emphasis of its intention, has made other provisions. Section 2914, Rev. Laws 1910, reads: 'Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears, and except also that the words hereinafter explained are to be understood as thus explained.'
>
> And in order to make itself still more clear as to its intentions, the Legislature in Section 2948, Id., said: '*The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a view to effect their objects and to promote justice.*' (Emphasis supplied.)
>
> Construing these statutes and constitutional provisions as a whole, we think it is clearly manifest that the legislative intent has been an endeavor to shake off the shackles of the common-law rules as to the rights of married women and to clearly define such rights."

Similarly, the statute involved in *Gilman* v. *Gilman*, 95 Atl. 657 (N.H. 1915) clearly demonstrated an intent to authorize husbands and wives to sue one another in tort. As the court observed:

> "If this language is given its ordinary meaning, she can maintain this action, provided she could

> maintain it if she were a single woman; for the statute provides in terms that, with certain exceptions not material here, she may sue and be sued in all matters as though she were unmarried. In other words, when the Legislature enacted this section it intended to remove all the disabilities the common law imposed on married women in so far as the right to sue was concerned, and, with certain exceptions, to put husband and wife on an equality in respect to property, torts, and contracts."

The *Gilman* case represents merely construction by a state court of a statute far different in its text from those presently involved; and does not, as petitioner contends, in any manner appear in conflict with the result reached by the courts below in construing a differently-worded statute.

Again, the Alabama case of *Johnson* v. *Johnson*, 77 So. 335 (1917), was predicated upon a remarkably different statute. As the court noted at p. 337:

> "[1] It is conceded, of course, that at the common law no such action could be maintained. That law regarded the husband and wife, for judicial purposes, as but one person, and, we may add, the husband was that person. Hence the rule to which we have referred and one result that husband and wife could not contract with or sue each other. While much of that law has disappeared under the pressure of a public opinion steadly growing in enlightment, it must still be conceded that *it is not for the courts by sudden strokes of policy to make deep innovations upon the established law:* We think, then, that the question now before us may be appropriately stated in the following form: Have our statutes on the subject of the rights of married woman left unchanged the theory of legal identity, of old the

foundation of the marital status, merely providing exceptions to the necessary consequences of that theory, or has that foundation been so substantially changed that, except as disabilities have been retained, each has against the other all the rights of persons not so related? Under our statutory system, our opinion is that the latter alternative may and should be adopted.

Section 4492 of the Code provides 'the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law,' 'The husband and wife may contract with each other,' etc. Section 4497. '*All damages which the wife may be entitled to recover for injuries to her person or reputation are her separate property.*' Section 4489. '*The wife must sue alone* • • • *for injuries to such property,* • • • or *for all injuries to her person or reputation,*' *etc.* Emphasis supplied. Section 4493. There are other sections bearing more or less remotely upon this subject. It may be said that the last-quoted section was not enacted with a view to precisely the case here presented; but these sections, the last included, have the effect of abrogating the fiction of legal identity, and seem thereby, except as otherwise prescribed, to destroy the foundation of the common law in its application to questions touching the rights of husband and wife inter se."

The North Carolina statute construed in *Crowell* v. *Crowell*, 105 S.E. 206 (1920) explicitly conferred upon a wife the right to maintain an action against her husband; and, again, all the court did was to construe a statute markedly different in its text from the ones presently involved. The North Carolina courts, interestingly enough, have adhered to the proposition that a statute in derogation of the common law must be strictly construed, for in a later decision, *Scholtens v. Scholtens*, 52 S.E. 2d 350, it was held

that the statute in question might not be construed to authorize the maintenance of a suit by a husband against his wife.

The statute construed by the South Carolina court in *Prosser* v. *Prosser*, 102 S.E. 787 (1920) explicitly provided access to the courts by a married woman "when the action is between herself and her husband."

In *Waite* v. *Pierce*, 209 N.W. 475 (Wisc. 1926) the court construed a statute broader in scope than the one at bar as authorizing the maintenance of a suit for damages by a wife against her husband.

In *Katzenberg* v. *Katzenberg*, 37 S.W. 2d 696 (Ark. 1931), the statute explicitly provided, as the court noted, its intention "to remove all statutory disabilities of married women as well *as common law disabilities*" *id*, at 696, emphasis supplied).

Fitzmaurice v. *Fitzmaurice*, 242 N.W. 526 (N. Dak. 1932) also involved the construction of a statute markedly different from the one at bar. As the court observed at p. 527:

> "In the absence of legislative enactment, the common law is in effect in North Dakota. Sections 4328, 4331, C.L. 1913. Plaintiff, however, insists that the Legislature has spoken in this behalf, and that the statute, section 4411, C.L. 1913, providing: 'Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which the other might, if unmarried. The wife after marriage has with respect to property, contracts and torts the same capacity and rights and is subject to the same liabilities as before marriage, and in all actions by or against her she shall sue and be sued in her own name'—clothes her with both the right and the capacity to recover damages against her husband on account of his torts. Section 4331, provides: "In

this state there is no common law in any case where the law is declared by the codes.'"

At pages 529, the court concluded:

> "But taking into consideration the growth and development of the idea of the emancipation of the wife and of the equality of husband and wife before the law as disclosed by the history of our legislative enactments, we hold that in this state the common-law rule is wholly abrogated, and that a wife may sue her husband for a personal tort."

Again, in *Rains* v. *Rains*, 46 P.2d 740 (Colo. 1935), the state court was careful to point out that the predicate of the interspousal litigation therein presented was an explicit state constitutional mandate, in addition to a statute broader in scope than the one at bar. As the court declared at p. 743:

> "Section 6, article 2, Colorado Constitution, is as follows: 'That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character. * * *' In this state a wife, as we have seen, is a person independent of the husband, and this section guarantees her a remedy for every personal injury without making any exception as to the person inflicting the injury, who may be her husband or a third person. Section 5577, Compiled Laws, provides: 'Any woman may, while married, sue and be sued, in all matters having relation to her property, person or reputation, in the same manner as if she were sole.' Here, also, there is no exception as to the person she may sue.
>
> Section 6 of the Code of Civil Procedure is as follows: '*A married woman may sue, and be sued in all matters, the same as if she were sole.*' There is no exception as to the person she may sue.

Appendix B

> It is urged with some force that this section relates to procedure only, and does not confer a substantive right. But that objection cannot be urged successfully against section 6, article 2, of the State Constitution or section 5577, Compiled Laws, quoted above." (Emphasis supplied)
>
> • • •
>
> "In view of the broad, liberal provisions of the Constitution and statutes of this state and the liberal construction thereof adopted by the courts of this state, we are unwilling to follow the decisions of courts that hold that a wife has no right to sue her husband for a personal injury caused by him."

A cursory perusal of the statutes before the court in *Scotvold* v. *Scotvold*, 298 N.W. 266 (S. Dak. 1941) demonstrates their intention to effect broad changes in a wife's substantive rights. The earlier legislative changes in these incidents of coverture codified in the present statute as the court points out but taken into account is contained in the following language at p. 268:

> "Then by Chapter 98 of the Session Laws of 1887, it was provided: 'That from and after the passage of this act, woman shall retain the same legal existence and legal personality after marriage as before marriage and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone; * * *.'"

In construing this forerunner as well as other statutes, the court declared:

> "Obviously this legislation deals with more than the mere right of the wife to sue and be sued in her own name. It makes sweeping changes in her substantive rights. By these changes she emerges as a legal personality with the civil rights of the ordinary person. Among those civil rights with which she is clothed by these statutes is the right to protection from bodily harm. SDC 47.0301. That a wrongful invasion of any of these civil rights gives rise to a cause of action in the wife, is the basis of the holding of this court in Mobery v. Scott, 38 S.D. 422, 161 N.W. 998, L.R.A. 1917D, 732."

On page 269:

> "Either the statute grants sweeping remedies to the wife as against her husband, or none. We think it intended to grant the wife rights and remedies as against the world."

Of significance however, is the liberal construction accorded the statutes in derogation of common law, not because of a trend or the minority *Thompson* decision, but, rather by mandate of its law. At page 268 the court declared:

> "[1] This legislation must be interpreted in the light of certain fixed principles. While the common law is in force in this jurisdiction except where changed by statute or by other expression of the sovereign will, SDC 65:0103, the rule of strict construction of statutes in derogation of common law does not obtain in this state. Our function is to effectuate the legislative purpose through liberal construction. SDC 65.0202."

Similarly, in *Lorang* v. *Hays*, 209 P.2d 733 (Idaho 1949) the court had before it statutory and state constitutional language far broader in scope than what is here presented.

The Ohio statute construed in *Damm* v. *Elyria Lodge No. 465*, 107 N.E. 2d 337 (1952) explicitly conferred upon spouses the right to sue one another in tort.

A similar provision of Kentucky law was construed in *Brown* v. *Gosser* 262 S.W. 2d 480 (1953).

The reference at p. 9 of the petition to *Koplik* v. *C. P. Trucking Corp.*, 135 A.2d 555 (N.J. 1957) is surprising in view of the extended discussion of *Immer* v. *Risko*, 46 N.J. 482, 267 A.2d 481 (1970) at pp. 16-17 of the petition. As we earlier observed (supra, pp. 8-9), the Court of Appeals correctly noted that the New Jersey diminution of the doctrine of interspousal immunity in tort applies only in the context of automobile negligence cases.

Ennis v. *Truhitte*, 306 S.W.2d 549 (Mo. 1957) also arose out of an automobile accident situation. In holding that a wife might sue the estate of her deceased husband for damages predicated upon his negligent operation of an automobile, the court merely declared that the survival statutes of that jurisdiction allowed the maintenance of the action at bar. That the doctrine of interspousal immunity was in no way disturbed was made plain in the later decision in *Brawner v. Brawner*, 327 S.W.2d 808 (Mo. 1959).

Kowaleski v. *Kowaleski*, 361 P.2d 64 (Ore. 1961) did not at all involve the question of whether one spouse may sue another in tort, but merely the issue of whether a wife might sue her husband's employer for damages occasioned as the result of the employee's negligence. The court, in allowing the maintenance of the suit, made it plain that if the action had been brought by the wife against her husband, it would have been barred by the doctrine of interspousal immunity as consistently applied by the Oregon courts.

Appendix B

Shepardization of the California case of *Self* v. *Self*, 376 P.2d 65 (1962) discloses that the courts of that state have construed the decision as merely a construction of statutory language. As was observed in *Klein* v. *Klein*, 376 P.2d 70, 73:

> "In Self v. Self, supra, Cal. app., 20 Cal. Reptr., it was held that because the reasons for the rule of interspousal immunity for torts no longer exists, *and because of certain legislative changes in recent years*, that rule should be abandoned." (Emphasis supplied).

We respectfully recommend to the Court, in connection with the case of *Cramer* v. *Cramer*, 379 P.2d 95 (Alaska 1963) the discussions of the District Court and Court of Appeals of that case reproduced at pp. 8a-10a and 16a-18a of the appendix to the petition.